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CASE NO. 90-1095

In The
Supreme Court of the United States

OCTOBER TERM 1990

FRANCES A. ARMSTRONG, *et al.*
Petitioners

v.

MARATHON OIL COMPANY
Respondent

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Can shareholders forcibly be divested of their ratable shares of a corporation without the right to seek just compensation in a court of law or does this constitute a "taking" of a contract protected by the contract clause of the United States Constitution, for which just compensation is guaranteed by the Fifth Amendment of the Constitution as applied to states by the due process clause of the Fourteenth Amendment?

Can a state create a single arbitrary formula of just compensation for the taking of a contract, or must state law specify that the trial court admit all relevant evidence proving the full monetary equivalent of the contract taken?

If a federal court first dismisses minority shareholder actions stemming from a cash-out merger by ruling as a matter of state law that a state appraisal remedy for dissenting shareholders is their exclusive potential remedy for the taking of their shares, may the state courts in that appraisal action subsequently rule in direct contradiction to the federal court while refusing to join or allow revival of those other remedies, or does the due process clause of the fourteenth amendment require the state court to either join the various causes of action or to reinstate the alternative action in statu quo ante?

Can a state evade the payment of just compensation for the taking of corporate shares by allowing disparate compensation for the shares of different shareholders, or does the equal protection clause of the Fourteenth Amendment to the Constitution force state law to offer equal payment for equal contracts taken?

May a state legislature redefine a remedy previously existing at common law so as to create a "special proceeding" for the purpose of contravening the right to a jury trial? Alternatively, does the Seventh Amendment to the Constitution provide the right to a jury trial for the taking of a contract protected by the contract clause?

Does the due process clause of the fourteenth amendment require the payment of equitable prejudgment interest upon judgments for just compensation?

PARTIES TO THE PROCEEDINGS

The following persons were parties to the appeal in the court below:

> Gordon T. Hoddinott, Donald M. White, and Douglas Littlewood are three former shareholders of Marathon Oil Company and are parties to this proceeding and co-petitioners. Francis A. Armstrong is a former shareholder who also represents over 550 named dissenters and 22 members of a class action. Cede & Co., is a quasi-governmental institution that is jointly owned by the major brokerage firms. Cede actually conducts the trading of most shares held in "street name" by those major houses. Cede has been a nominal party to this litigation only to ensure the inclusion of certain shareholders who held their stock in Marathon in "street name."

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DECISIONS BELOW

The opinion and judgment of the Supreme Court of the State of Ohio, Armstrong v. Marathon Oil Co., decided September 25, 1987, reported at 32 Ohio St. 3d 397; 513 NE 2d 776, is found in the Appendix, at A-20.

The opinions of the Ohio trial court and appellate court are not reported.

The Opinion and judgment of the United States Court of Appeals for the Sixth Circuit, Radol v. Thomas, decided September 13, 1985, reported at 772 F.2d 244, 54 USLW 2184, Fed Sec.L.Rep. ¶ 92,289 is found in the Appendix at A-73.

STATUTORY PROVISIONS INVOLVED

The Ohio corporate code has a statutory provision for the purpose of providing divested shareholders the right of an appraisal and accounting. These provisions, which were denied to Marathon shareholders, are found in Ohio Revised Code section 1701.85 (rev. 1974), set forth in the Appendix at A-100.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions violated by the unilateral divestiture of Marathon minority shareholders include:

Article I section 10, clause 1 of the United States Constitution, commonly known as the "contract clause," which provides in part:

> "No state shall . . . pass any . . . law impairing the obligation of contracts . . . ."

the "just compensation" clause of the Fifth Amendment:

> ". . . nor shall private property be taken for public use, without just compensation."

the Seventh Amendment , which provides in part:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved ...

and the following two clauses of the Fourteenth Amendment:

> "nor shall any state deprive any person of life liberty, or property, without due process of law . . . "
>
> "nor deny to any person within its jurisdiction the equal protection of the laws."

Also involved in this determination is Ohio's so-called "reserve clause," which purportedly grants the state the unilateral authority to amend corporate contracts or to pass laws empowering others to unilaterally amend corporate contracts. Article XIII section 2 of the Ohio Constitution reads in pertinent part:

> "Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed."

JURISDICTION

Petitioner respectfully request a writ of certiorari to review the judgment of the Supreme Court of Ohio, entered on September 26, 1990, upon appeal from the Ohio Court of Appeals, Third Appellate District, ruling that no substantial constitutional question exists.

The jurisdiction of this court is conferred by 28 U.S.C. §1257 based upon the ruling of the Ohio Supreme Court which construes the Ohio appraisal statute in a manner directly in contradiction to the United States Constitutional provisions concerning the impairment of contracts, the taking of property without just compensation, and due process of law.

STATEMENT OF THE CASE

Early in 1981, the management of Marathon Oil Company recognized that Marathon was selling on the New York Stock exchange at a price

which was significantly below the liquidation value of the company's assets. In order to begin defending itself against the possibility of becoming a target in a hostile takeover bid, the Marathon Board of Directors commissioned a leading oil industry investment banker, First Boston Corporation, to appraise the market value of the company's assets. This appraisal placed Marathon's net asset value at between $188 and $225 per share.[1]

On October 30, Mobil Oil Corporation announced a hostile offer of $85 cash per share for approximately 66% of Marathon stock while proposing to squeeze out the remaining shareholders for debentures worth approximately $75 per share.

Concluding that the $85 price that Mobil was offering was "grossly inadequate," Marathon's Board of Director's immediately authorized (a) the sending of letters to Marathon's shareholders urging them not to tender their shares, (b) the filing of a lawsuit to enjoin the Mobil tender offer, (c) the seeking out of other more acceptable merger partners, and (d) the consideration of "a complete or partial liquidation of the company."

Three weeks later, Marathon found a "white knight" in U.S. Steel. Pursuant to an agreement of merger between the Marathon and U.S. Steel directors, Marathon awarded U.S. Steel an option to purchase ten million shares at $90 per share and a "lock-up option" for the purpose of foreclosing all other bidders for the company.[2] Pursuant to the award of these options, U.S. Steel made an offer to Marathon shareholders to purchase 51% of Marathon stock at $125 per share, while threatening the remainder with being "squeezed-out" in a subsequent merger for U.S. Steel notes worth $76-$85 per share.

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1 An earlier internal appraisal, known as the "Strong Report" valued Marathon's net assets at between $276 and $323 per share. The Ohio Supreme Court ruled these reports immaterial, as a matter of law. The Sixth Circuit, on the other hand, ruled these reports highly material for the purposes of the dissenter's remedy of appraisal. 772 F.2d at 255(A-57).

2 The option would have allowed U.S. Steel to purchase Marathon's Yates oil field for far below market value. The Yates field was, by far and away, Marathon's most valuable asset—its "crown jewel" according to the Sixth Circuit Court in *Mobil v. Marathon.* By awarding U.S. Steel the option to purchase the field at a price below market, Marathon management insured there would be a substantial dilution of share value for any offer other than U.S. Steel. Under Ohio law, the sale of the Yates field alone would have been adequate cause for a shareholder's filing of an action for appraisal of his shares. Ohio Revised Code §1701.76.

On December 23, however, the Sixth Circuit struck down the U.S. Steel options as "manipulative devices" that had, for "all practical purposes completely block[ed], normal healthy market activity and, in fact, could be construed as expressly designed solely for that purpose." *Mobil Corporation v. Marathon Oil Co.*, 669 F.2d 366, 374 (1981).

However, despite the Circuit Court ruling, by the December 4 "pro rata" deadline, U.S. Steel already held 91.4% of the Marathon shares—and the court did not order disgorgement in its December 23 order. To make matters worse for the Marathon shareholders, although Mobil raised the cash portion of its offer to $126 per share, Marathon obtained an antitrust injunction against all Mobil offers. Marathon also rebuffed a tentative private offer of $120 per share, for <u>every</u> Marathon share from Gulf Oil Co.

Between November 30, 1981, the day Mobil announced its offer, and January 6, 1982, the day that U.S. Steel paid for majority control, the share price quoted on the New York Stock Exchange ranged between $64 and $108.[3] On March 10, 1982 the day before the merger vote, the closing price on the New York Stock Exchange was $75.

On March 11, 1982, following the acquisition of majority ownership by the U. S. Steel Corporation, the interests of all shareholders except the U.S. Steel Corporation were retired in exchange for notes valued at approximately $78 per share.[4] Officers and directors, however, were awarded $106 dollars per share for their outstanding stock options.[5]

Petitioners initiated this action in the Common Pleas Court of Hancock County, Ohio to seek as a remedy provided dissenting shareholders an appraisal and accounting of the "fair cash value" of appellants' shares of Marathon Oil Company. The dissenting shareholders' appraisal remedy was enacted pursuant to Ohio and United States constitutional requirements that prohibit the impairment of contracts or expropriation of property without the payment of just compensation.[6]

3 It is obvious, however, that thirty million shares were traded off of the exchange at $125 per share.

4. U.S. Steel failed to obtain the votes of a majority of the disinterested shareholders.

5 The officers and directors all obtained $125/share by tendering their shares at the commencement of the U.S. Steel tender offer.

6. OHIO REV. CODE § 1701.85. The intent of the Ohio legislation is to allow majority shareholders to make fundamental corporate changes in Ohio corporations, including the elimination of minority shareholders, in a

In 1983 the trial court in this action ruled, as a matter of law, that the stock exchange price was the price to be awarded, but, that because there was no free market on the day before the merger vote, the stock market price two months before the vote was a good estimate of fair cash value. In 1986, the Third District Court of Appeals upheld over twenty assignments of error submitted by all parties to the litigation. Among other things, the Court of Appeals reversed the trial court with regard to its definition of fair cash value, ruling as a matter of law that fair cash value could only be determined by an appraisal of the hypothetical market value of the entire company.

Marathon appealed that decision to the Ohio Supreme Court to rule that fair cash value be limited to market price less depreciation caused by the merger.

Ruling as a matter of judicial notice that all active markets for corporate shares are "efficient," the Supreme Court of Ohio then reversed the appellate court ruling, stating that stock exchange price on the day prior to the merger vote is irrebuttably presumed to be the fair cash value of a share, *as a matter of law,* less appreciation caused by the pending merger. According to the Ohio Supreme Court, wherever there exists active trading, stock exchange price on the day prior to the merger vote constitutes irrebutable evidence of "fair market value of a share" as a matter of law.[7]

The Ohio Supreme Court ruled that trial courts were precluded from admitting any evidence whatsoever regarding the intrinsic, liquidation, going concern, market, or other value of a corporation,[8] and that no

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constitutional fashion. "[A]rticles of incorporation . . . are subject to alteration by less than unanimous consent for the reason that they are *touched with the public interest.* This may constitutionally be done if provision is made for the payment of the fair value of shares or property rights to those who dissent." Ohio BAR Supp., (Sept. 1928) at 91; 10 OHIO JUR. *Corporations*, §70 at 138 nn.5, 6 (1930).

7. Shareholders may bring other actions for harm *separately* from the dissenter's action, but only if that action does not attempt to alter the dissenters' award. Citing *Radol*, the Ohio Court observed that such an action was likely prohibited by *res judicata.* 32 Ohio St. 3d at 422(A-38). Off-exchange trading prices are not admissible as evidence of market price. 32 Ohio St. 3d at 412(A-32). The Ohio court did not attempt to explain how there could have been "active trading" in Marathon shares in December through February if 91.4% of those shares were being held by U.S. Steel.

8 Said the Ohio court: " It is therefore most unreasonable to attempt to value a share of stock held by a dissenting shareholder, utilizing valuation techniques oriented upon inner-corporate functions and property holdings of which the

evidence of fraud, unfairness, breach of duty, or market manipulation was admissible in an action by dissenters pursuant to Revised Code section 1701.85.[9]

The Ohio Supreme Court also ruled that other allegations for injury from fraud or breach of fiduciary duty are maintainable as separate actions only provided that those actions do not attempt to overturn or modify the dissenter's cash award. The court refused to join other causes of action to the appraisal action. [10]

The court further ruled that an appraisal is a "special statutory proceeding" not subject to the constitutional dictates of due process nor requiring a trial by jury. [11]

The Ohio Supreme Court also ruled that the 8% statutory limit on interest was not applicable to this proceeding and the trial judge should award prejudgment interest based upon consideration of various rates of interest over that period of time.

A timely motion for rehearing based upon plain error was denied by the Ohio Supreme Court on November 4, 1987. Specifically, the motion asked the Ohio Court to clarify whether the trial court was to discount the appreciation caused by the merger only or whether the court should also discount the effects of the various tender offers outstanding.

Pursuant to this conclusion of law, the case was remanded to the trial judge to award dissenting shareholders exactly the same amount of money those shareholders would have received had they sold sold their shares on

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shareholder had little if any knowledge at the time he purchased the stock." 32 Ohio St. 3d at 408 (A-18).

9 Provable injury under whatever theory utilized is compensable so long as it does not seek to overturn or modify the fair cash value determined.

10. 32 Ohio St. 3d at 422. The court evidently will not admit evidence of fraud on the market, or any other evidence concerning the health of exchange prices in an appraisal action. The Ohio court did remand the action to the trial court for hearings to adjust the award for and "appreciation or depreciation" of the stock exchange price caused by the merger. Dissenter Price Trust moved for a rehearing based upon the conflict between the use of stock exchange price as irrebutable evidence and the admission of evidence—not including any prices during the tender offer or any evidence of intrinsic value—concerning price appreciation and depreciation.

11 The court evidently reasons that a dissenter's action for appraisal is the legal equivalent of a divorce proceeding, 23 Ohio St. 3d at 420 (A-35), *citing* Belding v. State, ex rel. Heifner, 121 Ohio St. 393 (1929). The Ohio Constitution requires a jury trial for proceedings in eminent domain.

the New York Stock Exchange, not during the course of competitive bidding, but on the day prior to the impending merger vote.

Proceedings on Remand

On October 30, 1987, the trial court conducted a pretrial conference. At the conference the court announced its intention to allow all parties to this action to engage in limited additional discovery and to allow all parties to offer additional evidence (including the testimony of expert witnesses) with respect to the issues to be decided on remand. Following the pretrial, Marathon filed a memorandum urging the trial court to reverse itself and to deny shareholders (including those who, like the Price Trust, were wrongfully denied the right to participate in the original trial) the opportunity to engage in additional discovery or offer additional evidence. In response, shareholders filed (on December 10, 1987) a brief pointing out the procedural and substantive defects in Marathon's reasoning and emphasizing the serious constitutional (both U.S. and Ohio) problems associated with the results sought by Marathon. Nonetheless, the trial court, by Memorandum issued on January 8, 1988 and by a Judgment Entry issued on January 22, 1988, sided with Marathon, reversed its prior ruling and declared that shareholders would not be permitted to engage in any additional discovery, nor offer any additional evidence.

The trial court's Judgment Entry including the following rulings:

> 3. That no additional discovery or additional expert witnesses will be permitted or either Plaintiffs or defendant.
>
> 4. Plaintiffs and Defendant shall deliver to this Court, not later than February 15th, 1988, their memoranda on the issue of what appreciation or depreciation, if any existed on the price of Marathon stock on March 10th, 1982 as a result of the U.S. Steel proposal submitted to Marathon shareholders. No reply briefs or memoranda will be permitted.[12]
>
> 5. On the issue of the rate of interest to be applied by the Court pursuant to the provisions of Section 1701.85 of the Ohio Revised Code, Plaintiffs and Defendant shall submit to this Court, no later than March 1st, 1988 their Memoranda on said issue. No reply Memoranda will be permitted.

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12 By letter dated February 4, 1988, this court changed the February 15, 1988 date to March 1 1988.

On March 18, 1988, the trial court delivered a memorandum decision on the issues of fair cash value and interest to be paid shareholders and followed that memorandum with a judgment entry on April 6, 1988.

Taking the time to first observe that no constitutional provisions were violated by the failure of the court to allow additional evidence and expert testimony,[13] the trial court ruled that the exchange market price of Marathon stock was $75.75 on the day prior to the merger, but the court also found that the price would have been depreciated by the decline of oil company stocks in the prior months absent the merger proposal by U.S. Steel. The court then found that the correct recompense for the expropriation of the investors shares was $68.43 per share. The trial court arrived at this number with no new evidence, despite the observation of Judge Whiteside in the original appellate ruling that neither party had submitted evidence or testimony concerning the appreciation or the market price absent *only* the merger.[14]

In consideration of the Supreme Court's ruling overturning the trial court's award of 8% interest to be paid upon the award of fair cash value, the trial court—considering all of the evidence—ruled that the equitable rate was not 8%, but rather 8.5% simple interest. The trial court awarded this rate of interest, even though not a single published rate of interest averaged below 9% for the past decade and the rate of interest paid upon judgments in Ohio is 10%. The court also discarded the consideration that US Steel financed the merger with notes yielding 18.1% per year.

Petitioners appealed this ruling to the Third District Court of Appeals. Petitioners appealed upon the grounds that the trial court's application of the Ohio appraisal statute was an unconstitutional taking of property because the trial court refused to admit evidence showing full value of the shares. Petitioners also appealed on the grounds that the 8.5% simple

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13 Armstrong v. Marathon Oil Co., No. 82-342-M (C. P. Hancock Co. 3/18/88) (Memorandum) at 4-6; Armstrong v. Marathon Oil Co., No. 82-342-M (C. P. Hancock Co. 4/6/88) (Judgment Entry) at 1.

14 Frances A. Armstrong, et al. v. Marathon Oil Co., (3d App. Dist, Ohio) (January 14, 1986) J. Whiteside. "Although Marathon did present testimony of an expert opinion as to what would have been the stock market price of Marathon stock on March 10, 1982, had there been no tender offer by anyone, or if there had been an unsuccessful tender offer, such evidence was little more than conjecture and, in any event, did not purport to constitute an opinion as to the per-share value of Marathon stock in a sale involving all, or substantially all, of the shares of Marathon stock. Appendix at A-63. For a discussion of the evidence available to the trial court see A-63 to A-65.

prejudgment interest had no basis in evidence, was an abuse of discretion, and violated petitioners right to due process.

The court of appeals ruled that it would not inquire into the thought processes of the trial judge—"the record does not indicate the in depth rationale of the trial court"—but nevertheless ruled that the proceeding was intended to be simple, no new evidence was to be allowed, and that the gross disparity between the amount awarded the dissenters and the amount received by the non dissenters provides no basis for review.

On September 26,1990 the Ohio Supreme Court rejected petitioners' appeal from that order, ruling that no substantial constitutional question was involved. Petitioners respectfully request a Writ of Certiorari to review that judgment.

Related Case

Numerous other lawsuits have been filed with regard to the U.S. Steel acquisition of control and subsequent total acquisition of Marathon. The largest and most comprehensive of those decisions was that of *Radol v. Thomas*, 772 F.2d 244 (1985) involving consolidated shareholder class action claims against Marathon, Marathon directors, and U.S. Steel involving issues of federal securities law and state fiduciary law. The Sixth Circuit ruling in *Radol* denied plaintiffs all claims under federal securities law and granted *summary judgment* for U.S. Steel and Marathon Corporation under state fiduciary laws.

Fundamental to the *Radol* decision was the explicit presumption of the Sixth Circuit that shareholders dissenting from the merger had a full statutory remedy of appraisal and accounting based upon the intrinsic value of the corporation as a whole, and not related to the exchange price for Marathon shares. In so presuming, the Sixth Circuit ruled that:

> [T]he law has given the majority the power to foreclose the ownership rights of the minority and has thereby eliminated the market as a correcting mechanism, *leaving minority shareholders with only the option of dissent and appraisal*. . . .

772 F.2d 244, 255(*emphasis added*).

This fundamental conflict between the positions of the federal Sixth Circuit and the Ohio Supreme Court concerning the interpretation of Ohio law, denies shareholders any and all relief from the expropriation of their shares. Shareholders are faced with a "Catch-22" in which the Sixth Circuit denies them a remedy for fraud or breach of duty based upon the exclusivity of appraisal while the Ohio Court declares that the only remedy

available to shareholders is barred by *res judicata*. This court is the only court that can resolve this conflict between the two highest courts to hear matters regarding the Marathon transaction.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The Court of Appeals ruled tht the stock exchange price as a test for just compensation was not a unique or unconstituional theory of valuation. Armstrong v. Marathon, slip op. (3/29/90) at A-4-5.

The question regarding the violation of due process by the rate of interest was addressed and dismissed by the Court of Appeals at A-6.

The question of whether causes of action surrounding the controversy of a squeezeout merger must be joined or whether the overrulling of a contradictory ruling by a co-equal federal court requires the reinstatement of that action, was raised and decided in the Ohio Supreme Court opinion at A-50.

The question of whether a jury trial is a constitutional right in a dissenters' appraisal proceeding was raised and decided by the Ohio Supreme Court at A-49.

The issue of whether shareholders in a corporation are protected by the equal protection clause of the Fourteenth Amendment was not formally reaised in this proceeding in that form. Shareholders have protested the disparate prices paid for shares at every point in the litigation, but have never asserted the "equal protection" clause. Petitioners want merely to have the value of their shares. Nevertheless, this question is raised as a subsidiary question to the first question of fair cash value, because it it apparent that if corporations are in fact allowed to offer different amounts to different shareholders—if different shares are worth different amounts—then any consideration of the appraisal remedy by this court could be evaded by the states by simply declaring that disparate share treatment is allowable.

REASONS FOR GRANTING THE PETITION

The purpose of the contract clause of the Constitution is to protect the integrity of private contracts.[15] Without the contract clause, government would have unfettered authority to expropriate property and politicians would be unlimited in their ability to reallocate property rights at will.[16]

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15. Epstein, *Toward a Revitalization of the Contract Clause*, 51:3 UNIV. CHI. L. REV. 703 (1984).

16 *See*, Epstein *supra* generally at 713

Without the contracts clause, commercial contracts, business charters, and even property deeds would be meaningless.

Such was the case 170 years ago when the state of New Hampshire attempted to seize the College of Dartmouth through the mechanism of charter revocation. The resulting decision of Chief Justice Marshall in the case of *Dartmouth College v. Woodward,* 17 U.S. (4 Wheat) 518 (1819), forms the foundation for all American corporate law.

The *Dartmouth College* ruling that all corporate charters are contracts protected by the Constitution meant that, according to the law of contracts, the dissent of one shareholder was adequate to prevent a fundamental corporate change otherwise supported by the state or all other shareholders. The doctrine was the survivor of so many repeated attacks that sixty years later Chief Justice Waite felt compelled to write that: "The doctrines of *Dartmouth College v. Woodward* ...have become so imbedded in the jurisprudence of the United States as to make them to all intents and purposes a part of the Constitution itself."[17]

For over a century, courts wrestled with the application of the *Dartmouth College* doctrine to problem of fundamental corporate change. To avoid the harsh consequences of the *Dartmouth College* case, states enacted statutes defining remedies for shareholders dissenting from fundamental corporate changes. As more states began to offer appraisal rights to shareholders dissenting from fundamental corporate change, the controversy surrounding the *Dartmouth College* decision reached such a low ebb that one commentator recently noted that it is no longer necessary to debate the constitutional foundations of the appraisal remedy, because the issue is firmly settled and every state has a dissenter's remedy that provides an appraisal and accounting of the intrinsic value of a shareholder's interest.[18]

This case involves the simple application of this well settled constitutional remedy. The facts are clear-cut: shareholders have had their shares taken from them against their will and they are therefore entitled to compensation equal to the value of their shares. That compensation is guaranteed by the contract clause that prohibits impairment of contracts without damages, and the Fifth and Fourteenth Amendments that prohibits the expropriation of property without just compensation and due process of law.

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17 Stone v. Mississippi, 101 U.S. 814, 816(1879).

18. *See* , Fischell, *The Appraisal Remedy in Corporate Law,* 1983 Am. Bar. Found. Res. J. 875, 875-80.

The result of this decision is to deny the dissenting shareholders of Marathon corporation any remedy whatsoever for the expropriation of their personal property.

In the recent case of *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1 (1976), this court held that the contract clause has an "important place in our constitutional jurisprudence" and that "its limitation on state power was not illusory." This court's order in *United States Trust* barring the impairment of specific contracts by legislation was closely followed by this court's order in *Allied Structural Steel v. Spannaus*, 438 U.S. 234 (1978),which barred the impairment of certain classes of private contracts by legislation. Just as the constitutional contracts clause protects a shareholder from states altering public or private contracts, so too, this court has repeatedly held that the contract clause protects shareholders from divestiture brought about by actions of private parties.[19] It is time for this court to reaffirm the application of the contract clause to private action.

This case involves the simple application of a well-worn remedy. Normally this action would consist of a trial confined to issues of fact. In this case, however, the Supreme Court of Ohio has ruled that no true appraisal shall be granted to the dissenting shareholders of any corporation whose stock is "actively traded."

While the language of the Ohio court is couched in terms of procedure, the *de facto* effect of the ruling is simply to deny shareholders any right of appraisal whatsoever. In the past fifteen years, several state legislatures have flirted with statutes that expressly deny the dissenter's remedy of appraisal for shares listed upon a stock exchange, despite a consensus by the State of Delaware and the American Bar Association to the contrary.[20] Not waiting for the legislature, the Ohio Supreme Court has now acted *sua sponte* to eliminate the dissenter's right of appraisal and accounting of Ohio corporations whose shares are actively traded—whether or not listed on an exchange.

The Ohio Supreme Court went even beyond the simple denial of appraisal, however. The *Armstrong* court ruled that dissenting

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19. *See e.g.* Looker v. Maynard, 179 U.S. 46 (1900).

20 Compare the evolution of this concept during the 1970s: Comment: *A Reconsideration of the Stock Market Exception to the Dissenting Shareholder's Right of Appraisal*, 74 MICH. L. REV. 1023 (1976);Conard, *Amendments of Model Business Corporation Act Affecting Dissenters' Rights*, 33 BUSINESS LAWYER 2587 (1978).

shareholders were not entitled to a full trial, but only a "special proceeding" similar to a divorce hearing.[21] And in this "special proceeding," the trial court was to bear in mind that the minority shareholders were not entitled share equally with the majority shareholders who squeezed them out.[22] Thus, not only does the Ohio Supreme Court deny the shareholders the right of appraisal, but the court sets the merger price[23] as a *ceiling* to any dissenter's remedy. Thus, a shareholder can never dissent at all, because he will always be guaranteed to get less than offered in the merger—no matter how little that might be.

When the trial court applied this test, shareholders were given 10% less money than they would have received had they simply sold their shares the day before the merger—in fact, they received almost 60% less than they would have received had they sold their shares on the exchange three months earlier, or 80% less than if they had tendered to US Steel.

This ruling directly contradicts the rationale upon which the Sixth Circuit relied[24] when denying these same shareholders the right to introduce evidence concerning fraud and breach of fiduciary duty. The contradiction between the Ohio opinion and the Sixth Circuit Court of Appeals ruling in has created a direct and explicit intercourt schism acting to deny shareholders a forum to remedy a forced and fraudulent divestiture. Only this court can eliminate conflicts between rulings of law of the coequal federal Sixth Circuit Court and the Ohio Supreme Court that have left shareholders with no forum to introduce evidence of fraud, unfairness, or any evidence whatsoever regarding the true value of Marathon shares, as a matter of law.

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21 32 Ohio St.3d at 420 (A-38). In Ohio, this distinction is not trivial. The Ohio Constitution guarantees property owners in Ohio the right to a jury trial in a proceeding to determine just compensation for the taking of property. *See*, 38 O. JUR. 3D *Eminent Domain* §255 *et. seq.*

22 32 Ohio St. 3d at 412 (A-23).

23 The merger price and the stock exchange price on the day before the merger will always be equal for shares of Ohio corporations because the Ohio corporate code prohibits arbitrage. Ohio Rev. Code §1701.85(A)(2) (A-68).

24 The denial of the dissenter's remedy of appraisal is in direct opposition to the Sixth Circuit Court of Appeals ruling in *Radol v. Thomas*, that pursuant to this court's ruling in *Santa Fe v. Green*, a corporate shareholder has no remedy for fraud in a squeezeout merger because it is not a market transaction protected by the federal securities laws.

In addition to being in direct contradiction with every Ohio Supreme Court decision since 1857,[25] the Ohio ruling directly attacks this court's exhaustively repeated position regarding the dissenting shareholder's right of appraisal. However, it has been a long time since this court has ruled directly on the dissenter's right of appraisal and the recent advent of the stock exchange exception to the constitutional right of appraisal presents a timely, critical, and controversial issue of constitutional law that is of immediate importance to all shareholders subject to squeezeout mergers in the aftermath of the takeover and "going private" frenzy triggered by the oil takeovers of 1981.

States are in dramatic disagreement over the scope of appraisal. Although Delaware has expanded the amount of evidence allowed in an appraisal action,[26] a few states have moved to eliminate it, either by tying it to the market, or be simple elimination. Presentlly pending before this court is the case of *Virginia Bankshares v. Sandberg*, Case No. 89-1448. In that case, a jury awarded shareholders 50% more money then they would have received in a squeezeout merger. The decision, however, was brought under the federal proxy laws because the State of Virginia has eliminated the appraisal action for shareholders of banks. The question in that case, before this court, is whether there was a lack of causation, with regard to securities fraud, because the majority could have squeezed out the minority without a remedy in any case. If this court wishes to continue the doctine it set forth in Sante Fe v. Green,[27] namely, that the state remedies are the exclusive remedies for a merger, then this court must act to see that those remedies are not unconstitutionally denied or shareholders might be divested of their shares for nothing at all.

In the case of *Dusquesne Light Co. v. Barasch*, 488 US 299, 109 S. Ct. 609 (1989),when evaluating return on investment under the takings clause, this court stated that: "It is not theory, but the impact of the rate order which counts." Nevertheless, this court ruled that: "A state's decision to arbitrarily switch back and forth between methodologies in a way which required investors to bear the risk of bad investments at some times, while denying them the benefit of good investments at others would raise serious constitutional questions." [28]

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25 *See generally* 1 Davies, OHIO CORPORATION LAW §§8623-14,15 & 72 (1942 ed. & 1950 Supp.).

26 Weinberger v. UOP, Inc, 457 A.2d 701 (1983).

27 430 U.S 462 (1977).

28 Slip op at 15.

Efficient market or no efficient market, shareholders today simply have no idea what it is that they own.

The principles of this case are fundamental to United States Constitution. Four separate clauses are violated: the contracts clause, the takings clause of the Fifth Amendment and two clauses of the fourteenth amendment: equal protection and due process. This case involves several thousand shareholders in a multibillion-dollar transaction, but it is dramatically overshadowed by the hundreds of equally large squeezeouts in the years following 1982, whose dissenters' actions are still being litigated.[29]

For 175 years, this court has held that shareholders interests in a corporation are protected by the contract clause, and the Fourteenth Amendment, and Ohio courts may not deny shareholders the full panoply of procedures due them under the Constitution

A corporation forms a three-way contract among a state, a corporation, and its shareholders. That contract is subject to the protection of Article 10 section 1 of the United States Constitution, which prohibits the impairment of contracts. No dissolution, consolidation, or other fundamental change may be made in the charter without unanimous consent of all shareholders. *Dartmouth College v. Woodward,* 17 U.S. (4 Wheat) 518 (1819).

Shareholders are likewise bound by their contract, and majority shareholders may not make use of state authority to merge corporations without unanimous consent of all shareholders. *Clearwater v. Meredith,* 68 U.S. (1 Wall.) 25 (1863); *Lauman v. Lebanon Valley Railroad,* 30 Penn. St. 46 (1858).

The harsh rule of unanimous consent may be ameliorated by a state's reservation of authority to amend corporate charters,[30] but that reservation of authority can never be so broad as to allow the state to affect the fundamental nature of the corporate charter.[31] As stated by this court:

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29 *See e.g.* Stein, *Where are the Shareholders' Yachts?* BARRONS (8/18/86) at 6 .

30 Dartmouth College v. Woodward, 17 U.S. (4 Wheat) 518 (1819), Story, J. concurring.

31 It has been argued that pursuant to a reserve clause, states have unlimited authority to alter charters or empower corporations to alter charters under any terms. With the recognition that this would allow legislatures to overturn the contract clause of the Constitution by statute, the overwhelming majority of courts have rejected such assertions with strong language. *See e.g.* Dow v.

> The reserve power is not unlimited and cannot be exerted to defeat the purpose for which the corporate powers were granted, or to take property without compensation, or arbitrarily to make alterations that are inconsistent with the scope and object of the charter or to destroy or impair any vested property right.

Phillips Petroleum v. Jenkins, 297 U.S. 629, 634-435 (1936).

A state's "reserve clause" has been held to enable majority shareholders to do what they could not do at common law: amend a corporate charter without unanimous consent. Pursuant to a state's reserve clause, consent of dissenting shareholders to abide by majority will is implied when an investor purchases corporate stock. But as stated by a preeminent scholar of Ohio corporations: "It is a bit absurd to assume that consent to merge or consolidate carried with it a consent to the obliteration of vested property rights."[32] Thus, in an action by majority shareholders to amend a corporate charter, this court has stated:

> The effect of such a provision, whether contained in an original act of incorporation, or in a constitution or general law, subject to which a charter is accepted, is at the least, to reserve to the legislature the power to make any alteration or amendment of a charter subject to it, which will not defeat or substantially impair the object of the grant, or any right vested under the grant, and which the legislature may deem necessary to carry into effect the purpose of the grant, or to protect the rights of the public or of the corporation, the stockholders or creditors, or to promote the due administration of its affairs.

Looker v. Maynard, 179 U.S. 46, 52 (1900).

In situations where minority shareholders dissent to a merger, consolidation or other fundamental corporate change, courts of equity have been willing to allow majority shareholders to proceed only upon an accounting, appraisal, and payment of pro-rata cash value to dissenting shareholders. *Southern Pacific Co. v. Bogert*, 250 U.S. 483 (1919); *Lauman v. Lebanon Valley Railroad*, 30 Penn. St. 46 (1858). In actions

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Northern Railway Co., 67 NH 1, 36 Atl. 510 (1887). In a series of three heated battles between the Ohio and U.S. Supreme Court, it was resolved that the Ohio Constitution could not confer unfettered authority upon the State of Ohio to amend corporate charters. Mechanics' and Traders' Bank v. Debolt, 59 U.S. (18 How.) 380, rev'g. 1 Ohio St. 592 (1855); Dodge v. Woolsey, 59 U.S. (18 How.) 331 (1855); State Bank of Ohio v. Knoop, 57 U.S. (16 How.) 369 (1853).

32. Lattin, LATTIN ON CORPORATIONS, at 582. (1971 ed.).

where the majority has acted pursuant to statutory authority, courts have ruled this to be pursuant to the state's delegation of the power of eminent domain and dissenting shareholders have the right to receive just compensation.[33]

In order to take advantage of these doctrines and provide maximum flexibility to majority shareholders, in 1927, the Ohio Bar Association drafted provisions for the new Ohio Corporate Code that provided the mechanism of appraisal as the remedy for numerous corporate changes. Professor Merrick Dodd who participated in the drafting of this "Model Act"[34] observed the following:

> [I]t is not surprising to find that, although the committee of distinguished lawyers who drafted the present Ohio General Corporation Act have accepted and used as the basis for the act the contractual theory with regard to the nature of the corporation, they have nevertheless deemed it desirable to set forth at considerable length the rules which shall, in the absence of anything to the contrary in the articles, determine the rights and duties of the shareholders among themselves, and have further, largely for the protection of shareholders who may find themselves in the minority, prescribed certain mandatory rules which cannot be varied by anything in the articles—protection of minorities being a matter as to which organizers of corporations are notoriously inclined to be lax.[35]

An investor's shares of a corporation, therefore, constitute a contract among the state, corporation, and other shareholders, and that contract, like any other contract, is protected by the contracts clause, the equal protection clause, and the due process clauses of the United States Constitution.[36] A shareholder dissenting to the divestiture of his shares

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33 Dickinson v. Consolidated Traction Co., 114 Fed. 232 (D. N.J. 1902); Perkins v. New Hampshire Power Co., 90 N.H. 534, 11 A. 2d 811 (1940); Narragansett Elec. Light Co. v. Sabre, 59 R.I. 288, 146 Atl. 777 (1929); Spencer v. Seaboard Air Line R. Co., 137 N.C. 107, 49 S.E. 96 (1904); Black v. Delaware & Raritan Canal Co., 24 N.J. Eq. 455 (1873). *See*, 66 A.L.R. 1553 (1930).

34 "The *Act* is more than a codification of existing law in one state; it reaches into fields where legislators and courts have so far only felt their way; it contains innovations; and it deserves a treatise." Wright, *The New Ohio General Corporation Act*, 75 U.PA. L.REV. 753 (1927).

35 Dodd, *Amendment of Corporate Articles*, 4 U.CIN. L.REV. 129, 132 (1930).

36 Authorities are unanimous on this point. Wheatley v. A.I. Root Co., 147 Ohio St. 127 (1946); Lattin, LATTIN ON CORPORATIONS 587, 589 (1971 ed); 1 Davies,

has the constitutional right of appraisal whether or not provided by statute.[37] The legislature may not abridge that right by statute and state courts must provide the full measure of process due a constitutionally mandated procedure.

The Ohio Supreme Court's opinion contained fundamental errors of constitutional law. First, the Ohio court erred in holding that the rule of unanimous consent for fundamental corporate change is merely a rule of common law.32 Ohio St. 3d at 402 (A-28-29). In fact, the rule of unanimous consent is a rule of constitutional law. Second, the Ohio court erred in holding that the limits of the appraisal remedy were exclusively defined by the legislature and legislative history.[38] In fact, the appraisal remedy is available whether or not provided by statute, and no legislation may limit its application. Finally, pursuant to these initial conclusions, the court ruled that an appraisal action is a "special proceeding" not entitled to the full panoply of process due an action at common law, equity, or even eminent domain.[39]

This court has defined just compensation to mean "the full monetary equivalent of the property taken." *U.S. v. Reynolds*, 397 U.S. 14, 16, (1970). Rulings of law that deny shareholders the opportunity to present evidence regarding "the full monetary equivalent of property taken" violate the strictures of the Fourteenth Amendment. By relegating dissenting shareholders to a "special proceeding" in which they are not allowed to introduce evidence of value, the Ohio Supreme Court has violated fundamental principles of due process.

Contrary to this court's rulings, the Ohio Supreme Court has denied dissenting shareholders due process of law by

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OHIO CORPORATE LAW (1942); Dodd, *Dissenting Stockholders and Amendments to Corporate Charters*, 75 U. OF PA. L. REV. 585 (1927).

37 Southern Pacific Co. v. Bogert, 250 U.S. 483 (1919); Wheatley v. A.I. Root Co., 79 App. 93 (1945), affirmed in part ,147 Ohio St. 127 (1946); Goodisson v. North American Securities Co., 40 Ohio App. 85 (1935); Moy v. Colonial Finance Co., 283 Pa. 323, 129 Atl. 115 (1923)

38 32 Ohio St. at 402 (A-28-299). The great irony of the court's position is that there is no legislative history in Ohio. An even greater irony is that virtually every article cited by the court in support of its position regarding legislative history was written after the 1955 legislation the Ohio court seems to find crucial.

39 In denying plaintiff Harrell the right to a jury trial, the court reasoned that a dissenter's action for appraisal is the legal equivalent of a divorce proceeding, 23 Ohio St. 3d at 420 (A-55), *citing* Belding v. State, ex rel. Heifner, 121 Ohio St. 393 (1929). The Ohio Constitution requires a jury trial for proceedings in eminent domain.

denying them the right to introduce evidence and present a case.

"In order to conform to the requirement of due process of laws, rules of evidence must be reasonable and provide an opportunity to present a case." *Crowell v. Benson* , 285 U.S. 22. This court has recognized that when the rules of evidence can have the effect of denying access to a remedy, those rules must be struck down as contradicting the requirements of due process.

Without entertaining argument of the parties, the Ohio Supreme Court ruled as a matter of law that shares traded on a major stock exchange are perfectly valued and therefore it is not necessary for the court to inquire as to the value of the corporation as a whole. 32 Ohio St. 3d at 408-413 (A-17-25). On remand, the trial court ordered that the parties were prohibited from introducing further evidence and were prohibited from full briefing of the remaining issues.[40] This was so even though there was not one witness who testified with regard to the "appreciation or depreciation caused by only the merger.[41]

The Ohio Supreme Court violated evidentiary standards of due process by creating an irrebutable presumption of evidence that fair cash value equals stock exchange price.

Without any legal precedent whatsoever, the Ohio Supreme Court ruled as a matter of judicial notice that active trading in a stock creates an irrebutable presumption of value in a dissenter's action for appraisal.[42] As the foundation for this judicial notice the court cites a series of articles from economic journals dating from 1963 to 1974. These articles discuss a theory of economic science born in the mid-1960s that has become known as the "Efficient Market" or "Random Walk" Hypothesis. These articles cited by the court constitute several of a huge library of economic literature delving into the issues of efficiency in the financial markets.[43]

40 Armstrong v. Marathon,Oil Co., Memorandum Order (C.P. Hancock Co.1/8/88) Walker, J.

41 *See* note 14, *supra*

42. These articles were not the subject of any discussion or debate by the parties to the action before the Ohio court. The articles are evidently the discovery of independent research by the Ohio court.

43 As observed by one author, only legal scholars think that the market is efficient. Gordon & Kornhauser, *Efficient Markets, Costly Information, and Securities Research,* 60 N.Y.U.L. REV.761 (1985).

The creation of the modern efficient market hypothesis (EMH) is generally traced to an article by Eugene Fama in 1965.[44] The theory has three formulations and three classes of adherents: the strong form, the semi-strong form, and the weak form. The strong form of the theory holds that market prices approximate the true intrinsic value of all stocks traded upon the New York Stock Exchange.[45] The semi-strong form postulates that stock prices *reflect* all *public* information available concerning share value. The weak form postulates that most of the time, most stock prices will reflect a "best guess" regarding true stock values for the small individual investor.

In the twenty-two years since the theory was originally proposed, academic reaction to the theory has come around full circle from nacent enthusiasm to aged skepticism. Recent research and literature has almost completely debunked the EMH. Not one leading economist today subscribes to the strong form of the hypothesis and even its most ardent supporters are abandoning the semi-strong form. Others have already abandoned the weak form. As stated by Harvard Economist Lawrence Summers, adherence to the hypothesis itself "represents a fad, a 'shared act of faith.'"[46] Says Yale economist Robert Schiller: the efficient market hypothesis "may be one of the most remarkable errors in the history of economic thought."[47]

The use irrebutable or conclusive presumptions violates constitutional standards of evidence.[48] The Fourteenth Amendment requires that no conclusive presumptions may be adopted by a court or legislature that would givean artificial and evidentiary force to certain facts which otherwise would be wholly irrelevant and inconclusive.[49] It could hardly be said that either a "fad" or "one of the most remarkable errors in the history of economic thought" would meet this standard.

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44 Fama, *Random Walks in Stock Market Prices*, 21 FIN. ANALYSTS J. 55, 56 . (1965)

45 No economist has ever proposed that any other exchange is efficiently priced.

46. Rohrer, *Ferment in Academia*, INSTITUTIONAL INVESTOR, (July 1985) at 69 .

47 Id. at 70.

48 *See eg. Request of the Senate No. 89-050*, Supreme Court of New Hampshire, Opinion3/10/89) in which the court rules that conclusive presumptions regarding highest and best use are unconstitutional.

49 *See, 29* AM JUR, 2D *Evidence*, §11, *et. seq.*

The use of stock market prices as a measure of just compensation is irrational, arbitrary, and unconscionable for four reasons:

1. Even if the strong form of the hypothesis were valid, it could not be valid in the context of a two-tier tender offer or a freezeout merger. According to Fama, the intrinsic value of a stock is based upon the discounted present value of its potential payout. One of the most substantial factors of that intrinsic value is the potential payout upon a merger or appraisal. As noted by professors Fischell and Lowenstein, appraisal of the intrinsic value of a corporation is the sole solution to the "prisoners dilemma" faced by a shareholder in a two tier squeezeout takeover.[50]

2.Even if the semi-strong form of the theory holds, that standard does not meet the standards of due process. "Disagreement among Market participants . . . *will give rise to discrepancies between actual [market] prices and intrinsic values."* Fama, *Random Walks in Stock Market Prices*, 21 Fin. Analysts J. 55, 56 (1965)(emphasis added). It is necessary to understand that to an economist, market efficiency merely means that the market participants are engaged in a "fair game."[51] The "fair game" says that even though the stock price is not right, it is as likely to be too high as too low. Americans, however, do not walk into courtrooms for the purpose of rolling dice. As stated by Justice Stewart in *Faretta v. California:* "[p]ersonal liberties are not rooted in the law of averages." 422 U.S. 806 (1975).

3.Furthermore, this "fair game" becomes less fair when management or a controlling shareholder decides to acquire the entire company.[52]

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50 Fischell, *The Appraisal Remedy in Corporate Law,* 1983 AM. BAR FOUND. RES. J. 875, 885. Lowenstein, *Pruning Deadwood in Hostile Takeovers: A Proposal for Legislation,* 83:2 COL. L. REV. 249, 307-309 (Mar. 1983). *See also:* Stout, *The Unimportance of Being Efficient: An Economic Analysis or Stock Market Pricing and Securities Regulation,* 87 MICH L. REV. 613 (1988).

51 *See,* Id.; Gordon & Kornhauser, *Efficient Markets, Costly Information, and Securities Research,* 60 N.Y.U.L. REV.761 (1985).

52 The Ohio corporate code denies appraisal for shares traded pending a merger. Thus, during the pendency of a merger, the "stock exchange price" must always float to the value of the compensation offered in a merger. Using the exchange price to determine appraisal denies the shareholders any value other than that offered in the merger.

Were management allowed to squeeze out shareholders at market price, management would be rewarded for driving down the price of the stock.[53]

4.Finally, as a factual matter, the market simply is not efficient even in a weak sense. Numerous studies of market efficiency over the past ten years have thoroughly documented the inefficiencies of the market.[54] It is no accident that the Ohio court cited no economic journals of the past thirteen years. The literature supporting its finding of fact by judicial notice that it has applied to this case as a matter of law, is simply not supportable by modern economic science.[55]

The direct contradictions of the rulings of the Ohio Supreme Court and the Sixth Circuit Court of Appeals combined to deny Marathon shareholders a forum in which to present evidence and obtain just compensation for the expropriation of their property.

Following this court's lead in *Santa Fe v. Green*, 430 U.S. 462 (1977) the Sixth Circuit Court of Appeals, in the action *Radol v. Thomas*, 772 F. 2d 244 (1985), denied Marathon shareholders actions at both federal *and* state law for fraud, manipulation, coercion, and directors' breach of fiduciary duty. The Sixth Circuit ruled that the tender offer of U.S. Steel, which preceded the squeezeout, was an entirely separate transaction from the proxy solicitation and squeezeout that followed and that it was not necessary to inquire concerning fraud in a merger because of the existence of a state appraisal remedy. The *Radol* court also ruled that the Marathon directors were protected from liability by the business

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53 In the aftermath of the astounding Marathon takeover, management-led leveraged buyouts have become immensely popular.

54 An overview and explanation of the large body of recent literature debunking the Efficient Market Hypothesis is given in Wang, *Some Arguments that the Stock Market Is not Efficient,* 19 U. CAL DAVIS L. REV. 341 (1986).

55 Ten years ago the ABA reversed its position on this point saying: "The former exception for shares listed on stock exchanges has been eliminated in the light of facts which have become more visible since the stock market exception was added to the Model Act in 1969. The 1970s have demonstrated again the possibility of a demoralized market in which fair prices are not available, and in which many companies publicly offer to buy their own shares because the market grossly undervalues them. Under these circumstances, access to market value is not a reasonable alternative for a dissenting shareholder. . . . In any event, the market cannot reflect the value of the shares 'excluding any appreciation or depreciation in anticipation' of the corporate change which gives rise to the dissenters' rights." Conard, *Amendments of Model Business Corporation Act Affecting Dissenters' Rights*, 33 BUS. LAW. 2587, 2596 (1978)

judgment rule, 772 F.2d at 255 *et seq.* (A-59-62), and the court ruled that the Marathon corporation, *qua* corporation, could never be liable for breach of fiduciary duty toward its shareholders, because the corporation has no fiduciary duty. 772 F.2d at 258 (A-63).[56] Finally, the *Radol* court confirmed the trial court's summary judgment in favor of U.S. Steel with regard to matters of fiduciary duties, ruling that there are no fiduciary duties owed to shareholders during a squeezeout.

The essence of the *Radol* opinion is that the tender offer and subsequent squeezeout merger were separate transactions with a single remedy—appraisal.[57] The essence of the *Armstrong* opinion was that these were one unitary transaction with one remedy—breach of fiduciary duty.[58] The Sixth Circuit held that the shareholders could not avail themselves of the proxy laws in the first stage as a remedy for the second stage, while the Ohio Supreme Court ruled that the appraisal remedies of the second stage would be based upon the market in the first stage. The Sixth Circuit denied a remedy for breach of duty based upon the availability of an accounting and appraisal, while the Ohio Supreme Court denied an accounting and appraisal based upon the availability of a separate action for breach of duty. But the the Ohio Court ruled the separate remedy unavailable by way of *res judicata.*

Thus, in federal court, the shareholders are denied an action for fraud during the acquisition of control because there has yet to be a squeezeout. They are denied an action for fraud in the squeezeout because they have no discretion. Finally, they are denied an action for coercion, manipulation, and breach of fiduciary duty because there was no fraud.

However, by limiting the dissenter's recompense to market price, the Ohio Supreme Court has relegated the dissenter to the vicissitudes of a

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56. Observing that cases dealing with corporate fiduciary duties all concerned corporations acting as majority shareholders, the *Radol* court nevertheless failed to address the issues of fiduciary duties owed by U.S. Steel.

57 It is not clear how the Sixth Circuit dealt with the issue of the disparity of price between the cash-out price provided the officer and directors and that provided the shareholders. Marathon justifies the $20 per share premium paid to officers as being the "blended price" achieved by "blending" the takeover price with the squeezeout price in a unitary transaction. If the Sixth Circuit is to be taken at its word concerning the separate nature of the two transactions, at the very least, the directors have a fiduciary duty to ratably share the proceeds of the merger.

58 Although the Ohio court viewed the transaction as a unitary transaction 32 Ohio St. 3d at 412 note 19 (A-21), the court still refused to allow minority shareholders participation in the "control premium."

defrauded and manipulated market.[59] Shareholders are whipsawed between two courts playing hot potato with their claims.

This unreconcilable schism has developed because the federal courts have ruled the markets in squeezeouts to be inherently "inefficient" while on the other hand, the Ohio Supreme Court has held that all trading on a national exchange is efficient as a matter of law.[60] The Sixth Circuit ruled that:

> the law has given the majority the power to foreclose the ownership rights of the minority and has thereby eliminated the market as a correcting mechanism, leaving minority shareholders with only the option of dissent and appraisal.

772 F.2d at 255 (A-57).

In turn, however, the Ohio Supreme Court has ruled that investors buy and sell stock on the federally regulated exchanges, wholly without concern or reference to the internal affairs of the corporation. Said the Ohio court:

> It is therefore most unreasonable to attempt to value a share of stock, held by a dissenting shareholder, utilizing valuation techniques oriented upon inner-corporate functions and property holdings of which the shareholder had little if any knowledge at the time he purchased the stock."

32 Ohio St. 3d at 408 (A-18).[61]

The Ohio Court goes on to state that:

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59 Note that the Ohio Supreme Court denied any other methods for determining value in a dissenter's action. The court states: "the statutory proceeding under R.C. 1701.85 is the sole means for determining the value of a dissenter's shares. . ." 32 Ohio St. 3d at 422 (A-38).

60 In this regard the Ohio court, *sua sponte,* by judicial notice, overturned the trial court's finding of fact that the exchange price of Marathon at the time of the merger was inherently not the subject of a free market.

61 The Ohio court evidently views the dissenter's right as some sort of vindication of the dissenter's righteousness in dissenting. Yet the court ruled that ***no evidence of value may be admitted in court*** to show the true value of shares apart from market value. The court states that ***as a matter of law*** internal and confidential information is "largely unknown to the shareholder at the time he purchased his stock. Consequently, it formed little or no part of his decision to purchase the stock or indeed, to dissent from the tender offer and merger." 32 Ohio St. 3d at 409 (A-18).

> [T]he owner of shares of a company listed on a national securities exchange *regards himself as an investor in those securities, rather than as a part of the corporate enterprise. . . .Since the measurement of these objectives is provided by the exchanges* . . . dissent and appraisal no longer [should be] required.[62] (*emphasis in original).*

This fundamental conflict with regard to the interpretation of corporate law has left shareholders with no discretion and no remedy in a multistage transaction by which they are forcibly divested of shares.

This court has repeatedly held that shareholders are entitled to the ratable benefits of the corporation as their interest appears, and it is a violation of the Equal Protection Clause of the United States Constitution for the Ohio Supreme Court to hold as a matter of law that controlling shareholders and officers are entitled to greater profits than minority shareholders similarly situated under the law.

Equality of shareholders is the polestar of corporate law.[63] A "share" of an Ohio Corporation is a contractual ownership of a pro rata portion of that corporation; all powers granted to a corporation are exercisable only for the ratable benefit of all shareholders. "In determining the rights of shareholders as between themselves, we go back to the principle of partnership law and the rule that unless otherwise expressly specified all shares are equal." Speech by E.J. Marshall, *Amendments to the General Corporation Act*, reprinted in Ohio BAR (11/28/38) at 498. Stockholders of the same class are entitled to the same treatment.[64]

Adolf Berle, this century's leading corporate scholar has stated:

> [A]ll powers granted to a corporation or to the management of a corporation or to any group within the corporation, whether derived from statute or charter or both, are necessarily and at all times exercisable only for the ratable benefit of all shareholders as their interest appears.

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62. 32 Ohio St. 3d at 408 (A-18), quoting, Note, *A Reconsideration of the Stock Market Exception to the Dissenting Shareholder's Right of Appraisal*, 74 MICH. L. REV. 1023, 1024 fn. 4 (1976).

63 *See e.g.* Lattin, LATTIN ON CORPORATIONS, 587, 589 (1971 ed.); Brudney and Chirelstein, *Fair Shares in Mergers and Takeovers*, 88 HARV. L. REV. 297, 330, 340 (1974).

64 Brudney, *A Note on Going Private*, 61 VA. L. REV. 1019, 1022 n.12 (1975)

Berle, *Corporate Powers as Powers in Trust*, 44 Harv. L. Rev.1049, 1049 (1931).

Nowhere is the concept of equality more exposed than in a corporate squeeze-out such as occurred in this case. In *Southern Pacific Co. v. Bogert*, 250 U.S. 483 (1919), Justice Brandeis declared:

> The essential of the liability to account sought to be enforced in this suit lies not in the fraud or mismanagement, but in the fact that, having become a fiduciary through taking control of the Old Houston Company, the Southern Pacific has secured fruits which it has not shared with the minority. The wrong lay not in acquiring the stock, but in refusing to make a pro rata distribution on equal terms among the Old Houston Company shareholders. . . . The duty of the majority shareholder to make pro rata distribution of the fruits of its control on equal terms among the minority is fiduciary and not dependent upon fraud or mismanagement.

Id. at 492. It is fundamental to the operation of corporate law that management not be allowed to "repudiate any part of the contract through which it had secured a part of its capital." *Wildermuth v. Lorain Coal & Dock Co.*, 138 Ohio St. 5, 19 (1941).

The Ohio court states that the appraisal remedy seeks to determine not the fair cash value of the corporation but the fair cash value of a share of stock. Ruling that an investor "regards himself as an investor in those securities rather than as a part of the corporate enterprise," [65] the Ohio Supreme Court overruled the Ohio appellate ruling that the value of a share was equal to the value of a pro rata portion of the firm. To say that a "share" is a "piece of paper" is to read into the corporate code what the legislature refused to put in it: a limitation upon the "share" concept.[66]

Stating that prices paid by U.S. Steel to obtain control of the corporation were "premium prices to obtain control," the Ohio Supreme Court ruled that this premium "is not properly includable in determining the market value of the shares of stock." 32 Ohio St. 3d at 412 (A-23).[67]

65 23 Ohio St. 3d at 408 (A-18).

66 "Share" is not defined in the Ohio corporate code.

67 The Ohio Supreme Court never discusses how there could have been active trading of Marathon shares on the exchange while U.S. Steel held 91% of the shares in escrow. Nor does the court explain why those trades should be considered by the court while the vast majority of the shares were being traded between U.S. Steel and the tendering Marathon shareholders.

The Ohio court refused to deal with the absolute disparity between the $125 offered for the stock owned by the officers and directors, the $106 for their option and warrants, and the $76 offered to the remaining minority shareholders.

Much more importantly, however, by denying the shareholders the right to pro rata participation in the wealth of the firm, the Ohio Supreme Court relegates minority shareholders to second-class citizenry. The Ohio Court empowers U.S. Steel to expropriate the entire wealth of the corporation and take a "control premium" all to itself without the requirement of equal participation of all shareholders.

This fundamental disparity of treatment among shareholders who all own the same shares pursuant to the same Ohio law, is the essence of what the equal protection clause of the Fourteenth Amendment was intended to prevent. It has long been apparent that government and powerful private interests can conspire to deprive the less powerful of property, the enforcement of contracts, and other privileges enjoyed by the powerful. With every modern case under the equal protection clause, this court has recognized that persons similarly situated under the law are entitled to equal treatment under the law. It is therefore fundamentally unconstitutional to say that "controlling" shareholders own corporate wealth, while minority shareholders merely own pieces of paper. And it goes without saying that in one transaction a corporation cannot pay one shareholder one share price and another shareholder another price.

Shareholders dissenting to a merger are entitled to a jury trial of appraisal because the appraisal remedy is a lesser remedy substituted for a greater remedy that existed at common law.

The repeated request for a jury trial in this case was denied by the Ohio Supreme Court. The court stated that the constitutional right to a jury trial applies only where trial by jury existed at common law. Although the Ohio Constitution provides for a jury trial for a "taking" by eminent domain or the collection of an ordinary debt, the Ohio Supreme Court chose instead to compare the dissenters' remedy to a claim for child support. Thus the Ohio Court ruled that this was a "special proceeding" "most similar to those kinds of proceedings which were exempt [from jury trials] at common law."

While it is true that the appraisal remedy did not exist at common law, it is also true that the appraisal remedy is a remedy that the legislature has

substituted for the greater remedy that previously exsited—namely, the right to enjoin the merger altogether.

It is quite apparent that if the legislature can substitute "special proceedings" for common law remedies, then the legislature can also deny the Constitutional right to a jury trial in any action it chooses to do so. In other words, if this case stands, a state legislature could overrule the Constitution by creating statutory "special proceedings" whereever it sought "judicial efficiency."

If a shareholder opposing a merger has a right to a jury trial at common law, and if the contract clause protects his right to that contract, then the legislature should not be allowed to eliminate his rights by redefining his remedies.

This court should rule that the due process clause of the Fourteenth Amendment mandates the payment of equitable prejudgment interest upon any judgment order enforcing a previously existing obligation.

In a dissenter's action for the appraisal of shares in Ohio, the dissenting shareholders are obligated to turn in their share certificates for leganding and forego any payments made to other shareholders in the merger. In this case, US Steel, now USX, issued notes with a primicipal amount of $100 per share paying a nominal interest rate of 12%, or an actual rate of 17.28% compounded semiannually, for an annual yield of 18%.[68] Although Ohio law provides for the payment of interest during the pendency of the appraisal, the shareholder surrenders the use of his money to the corporation during that time—six and a half years in this case. The appraisal statute also provides for the payment of interest upon the award of fair cash value.

In his first judgment in 1983, the trial judge awarded 8% simple interest to be paid upon the fair cash value of the shares. This award was based upon the statutory rates for usury in Ohio at the time of the merger.

The Ohio Supreme Court rejected this award and ruled that the Ohio statutory rate for interest upon judgments was not controlling and the proper amount would be a rate of interest based upon "various kinds of loans, the average prime rate over that period of time and any other such evidence."

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68 The actual rate of interest is based upon the discounting of actual market price of the notes, which was approximately $76 per $100 of principle.

On remand, the trial court ruled that 8.5% simple interest would suffice for prejudgment interest. This was despite the fact that Ohio statutory rate for judgments is now 10%. This was despite the fact that US Steel financed the merger with notes yielding 18% interest per year. This was despite the fact that even the average rate of interest for 60 day GMAC commercial paper was well over 9% for the period.

Had this ruling been made in federal court, the interest award would have constituted an abuse of discretion.[69] In fact, had this ruling been made in any normal forum, the interest award would have been inadequate.

Although interest awards on judgments were not necessarily favored in early common law, modern courts and legislatures have virtually unanimously provided for prejudgment interest upon previously outstanding obligations. Only because the Ohio Supreme Court has declared this to be a "special proceeding" does the trial court now obtain the discretion to deny a reasonable rate of interest.

This Court has never ruled that due process requires the payment of prejudgment interest, yet it is obvious that the denial of prejudgment interest on outstanding obligations essentially eliminates the appraisal remedy in Ohio. This court has already recognized the constitutional imperative for paying a reasonable return for equity investments in utility rate takings cases.[70] It is now time for this court to establish this accepted doctrine as a pillar of due process or states can evade payments in other "taking" cases by delaying the judgment and awarding no interest.

CONCLUSION

One recent commentator has noted that it may be socially acceptable to relax the contract clause, but it is not good constitutional doctrine.[71]

Dismissal of this appeal would signify that shareholders have no protection from the expropriation of their shares. It would provide present corporate managers the opportunity to acquire all corporate wealth in the

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69 See e.g., Ford v. Alfaro, 785 F.2d 835 (1986); Todd Shipyards v. Turbine Service, 674 F.2d 401 (1982).

70 "Return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks." Duquesne Light co. v. Barasch, *supra.* at 14, citing Federal Power Comm'n v. Hope natural Gas Company, 320 U.S. 591 (1944).

71 Palmer, *Obligations of Contracts, Intent and Distortion*, 37 CW RES. L.REV 631 (1987).

country and destroy the corporation as useful form of business organization.

Writing about the contracts clause in *The Federalist* James Madison observed:

> ·The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators. . .[72]

The shareholders in this action have been done a grave injustice, but this case is only one of the first of the great takeover and going private wave of the 1980s. Because few of those cases will ever survive the gamut of appraisal litigation to reach this court, this case provides a unique opportunity for this court to reaffirm a constitutional basis for corporate wealth, while at the same time, assuring American investors that there is a solid foundation to their investments.

Respectfully submitted,

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[72] The Federalist No. 44 at 282-83. cited in Merrill, *Public Contracts, private Contracts, and the Transformation of the Constitutional Order*, 37 CW RES. L.REV. 597, 628 (1987).